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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

FULTON CORPORATION,

Petitioner,

V.

BETSY Y. JUSTUS, SECRETARY OF REVENUE,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTION PRESENTED

Whether the North Carolina intangible personal property tax on the value of corporate stock owned by shareholders discriminates against interstate commerce, or otherwise violates the United States Constitution, by taxing one hundred percent of the value of stock of corporations that do no business in North Carolina, but exempting from taxation the stock of corporations that do business only in North Carolina, and reducing the taxable value of the stock of other corporations proportionately as the amount of business done by the corporation in North Carolina increases.

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Petition for a Writ of Certiorari to the Supreme Court of North Carolina

Fulton Corporation (herein "Taxpayer") respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina in this case.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina (Appendix A, *infra*, 1a-17a) is reported at 1994 WL 685491 (N.C. 1994). That opinion reversed the decision of the North Carolina Court of Appeals (Appendix B, *infra*, 18a-35a), reported at 110 N.C. App. 493, 430 S.E. 2d 494 (1993).

JURISDICTION

The Supreme Court of North Carolina issued its opinion on December 9, 1994 and the clerk entered the judgment and issued the mandate of the court on

December 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, clauses 1 and 3 of the United States Constitution provide in relevant part:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

Pertinent portions of the North Carolina taxing statutes (N.C. Gen. Stat. §§ 105-203, 105-130.7, 105-130.4 and 105-130.3) appear in Appendix C at pp. 36a-38a.

STATEMENT OF THE CASE

A. Procedural Background and How the Federal Question Was Presented

Taxpayer sued the North Carolina Secretary of Revenue in the Superior Court in May 1991 complaining that N.C. Gen. Stat. § 105-203 violates the Commerce Clause and the Fourteenth Amendment to the United States Constitution, insofar as the statute imposes an intangible personal property tax on some or all of the value of corporate stock owned by Taxpayer. The trial court allowed the Secretary's summary judgment motion and denied Taxpayer's. Taxpayer appealed and relied on the Commerce Clause and the Fourteenth Amendment in its brief.

The North Carolina Court of Appeals on 15 June 1993 filed its unanimous opinion reversing the trial court's decision on the merits and remanding the cause for entry of a judgment declaring the intangibles tax provision at issue to be in violation of the Commerce Clause. *Fulton Corp. v. Justus*, 110 N.C. App. 493, 430 S.E.2d 494 (1993), Appendix B, *infra*, 18a-35a.[1] The opinion identified as the offending provision the deduction from the tax base contained in N.C. Gen. Stat. § 105-203(1), which deduction increases as the amount of business done in the state by the stock-issuing corporation increases.

The Supreme Court of North Carolina reversed the decision of the Court of Appeals, reinstating the decision of the Superior Court, and ruling that the intangibles tax on stock does not violate the Commerce Clause. The decision declined to consider Taxpayer's other constitutional claims.[2] *Fulton Corp. v. Justus*, 1994 WL 685491 (N.C. 1994), Appendix A, *infra*, 1a-17a.

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[1]Taxpayer does not here seek review of the federal issues raised by the adverse decision of the North Carolina Court of Appeals on its refund demand and its request for attorneys fees because that decision was reversed by the Supreme Court of North Carolina and is not the final decision of the highest state court. Taxpayer understands that those issues can be reconsidered by the North Carolina courts in the event that this Court reverses and remands the North Carolina Supreme Court's decision, and should an adverse decision again be made by the North Carolina Supreme Court on those issues, Petitioner can seek review by this Court at a later time.

[2]Taxpayer wishes to preserve the right to rely on the Fourteenth Amendment, although its application is not further discussed herein.

B. North Carolina Intangibles Tax Scheme

North Carolina imposes a property tax on the fair market value of certain financial intangibles, including corporate stock, which is taxed to shareholders. The tax is not imposed uniformly on the full fair market value of all taxpayers' stocks. Instead, the owners of the stock of certain corporations can deduct from the full value a percentage thereof, up to and including one hundred percent.

The deduction is one hundred percent if one hundred percent of the business activities of the corporation issuing the stock occurred within North Carolina in a specified earlier year. N.C. Gen. Stat. §§ 105-203(1), 105-130.7(1), 105-130.4. Examples include incorporated purely local businesses such as corner drugstores, professional associations and the like. The stock of such corporations owned by North Carolina residents is free of intangibles tax.

No deduction from the full fair market value of the stock is allowed if the corporation is a foreign corporation that did no business in North Carolina in a specified earlier year. *See* N.C. Gen. Stat. § 105-130.3 (under which such a corporation is not subject to the state's corporate income tax). Examples are large national corporations such as Exxon Corp., Ford Motor Co. and Raytheon Corp. ("Stock and Bond Values as of December 31, 1990" in Exhibit Notebook that is part of the Record in the North Carolina appellate courts, hereinafter "Record Exhibit Notebook")

In other cases the deduction is a percentage of the stock's value equal to the percentage determined by

comparing its business activities in North Carolina with all of its business activities. Corporations in this latter category can be referred to as multistate corporations that do business in North Carolina. *See* N.C. Gen. Stat. § 105-130.4(b). While this group includes domestic North Carolina corporations that do some business outside the state, most commonly it includes large national corporations that do a small amount of business in the state, such as IBM (5%) and General Electric (1%). (Record Exhibit Notebook)

The percentage of a multistate corporation's business activities in North Carolina is quantified by use of the allocation and apportionment rules of the North Carolina corporate income tax. N.C. Gen. Stat. § 105-203(1), § 105-130.7(1), § 105-130.4. The allocation rules allocate to North Carolina all of the nonbusiness income from certain passive investments (i.e., interest and dividends received by a corporation whose commercial domicile is in North Carolina, and rents received from property located in North Carolina). N.C. Gen. Stat. § 105-130.4(c) - (h). The apportionment rules apportion to North Carolina that part of the corporation's business income earned in the state, determined by comparing its payroll, property and sales activities within the state to the totals thereof and averaging the three percentages, with the sales percentage being double weighted. N.C. Gen. Stat. § 105-130.4(i) - (l).

In practice, shareholders determine their intangibles tax bases by multiplying the full value of their stock in a corporation by the corporation's "taxable percentage," which the Secretary of Revenue determines and publishes annually for a large number of corporations. For example,

the taxable percentage for 1990 for IBM was 95% and for General Electric was 99%. (Record Exhibit Notebook)

C. **Application of the Intangibles Tax to Taxpayer**

It is undisputed that the North Carolina intangibles tax applied as follows to the stocks owned by Taxpayer on December 31, 1990. Most of Taxpayer's stocks were "100% taxable." This means that the issuing corporations were neither domiciled in North Carolina nor did business in or earned income from North Carolina (and so were not subject to the North Carolina corporate income tax). Taxpayer was charged intangibles tax on 100% of the market value on December 31, 1990 of the stock of such corporations. Taxpayer owned stock of one corporation that did part of its business in North Carolina, Food Lion, Inc. Its stock's taxable percentage was 54%, meaning that 46% of Food Lion's business was done in North Carolina (and 46% of its net income was allocable to North Carolina for corporate income tax purposes). (Record in North Carolina appellate courts, p. 49)

D. **Proceedings Below**

The North Carolina Court of Appeals ruled that the intangibles tax on stock facially discriminates against interstate commerce because "shareholders of out-of-state corporations are required to pay intangibles taxes on a higher percentage of shares [values] than shareholders of corporations operating solely in North Carolina." 110 N.C. App. at 499, 430 S.E.2d at 498. The Court of Appeals recognized the applicability of this Court's internal consistency test for Commerce Clause violations, which asks whether the state's tax regime, if adopted by all

states, would necessarily result in discrimination against interstate commerce. *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984). The Court of Appeals rejected the Secretary of Revenue's argument that the property tax imposed on stock was a "compensating tax" designed simply to make interstate commerce bear a burden already borne by intrastate commerce in the form of the corporate income tax. The Court of Appeals found the property tax on stock and the income tax on corporations not to be imposed on substantially equivalent events whose taxation at the same rate could be comparable. This Court has ruled that a tax may be considered a compensating tax only when imposed on substantially equivalent events. *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815, 1821, 128 L. Ed. 2d 639 (1994).

Finally, the Court of Appeals distinguished the 1912 decision of this Court in *Darnell* because it involved a property tax on stock that treated the stock as embodying the corporate property, which also was subject to the state's property tax; the Court of Appeals found no similar effort by North Carolina to tax corporate property once. *Darnell v. Indiana*, 226 U.S. 390, 33 S. Ct. 120, 57 L. Ed. 267 (1912).

Darnell involved an Indiana property tax on the value of stock owned by shareholders and a separate Indiana property tax on the value of tangible property owned by corporations. Shareholders of domestic corporations could deduct from their stock's value the value of the corporation's tangible property taxed by Indiana. Thus, Indiana treated the shareholder's stock value as embodying the value of the tangible property owned by the domestic corporation, plus any intangible

value. The complaining Indiana taxpayer in *Darnell* owned stock in a Tennessee corporation, which did not own property in Indiana. His stock in the Tennessee corporation was taxed at one hundred percent of its value. The United States Supreme Court ruled that the Indiana scheme treated the Tennessee corporation and domestic Indiana corporations with "substantial equality" because Indiana taxed the property of domestic corporations and taxed as property the stock of foreign corporations.

On appeal from the Court of Appeals, the Supreme Court of North Carolina did not dispute the facial discrimination of the North Carolina intangibles tax, but found that the *Darnell* decision controlled and required it to accept North Carolina's compensating tax defense to the facial discrimination. The Supreme Court of North Carolina ignored the discrimination inherent in the North Carolina scheme's violation of the internal consistency test.

REASONS FOR GRANTING THE PETITION

The North Carolina Supreme Court's decision highlights the need to resolve a conflict between this Court's compensating tax defense to Commerce Clause violations and its internal consistency test, which identifies Commerce Clause violations.

I. The Supreme Court of North Carolina Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court: the Current Force of *Darnell v. Indiana*; In Doing So, the Supreme Court of North Carolina Ignored Applicable Decisions of this Court

A. Summary

The North Carolina Supreme Court concluded that the *Darnell* decision specifically, and the compensating tax defense generally, permit a state to prove that its facially discriminatory tax does not effectively discriminate against interstate commerce *solely* by analyzing the effect of other taxes imposed by that one state. Two other state appellate courts have used the same approach to reject Commerce Clause objections to their state's taxes within the last four years. *Indiana Department of State Revenue v. Felix*, 571 N.E. 2d 287, 292 (1991), *cert. dismissed*, 112 S. Ct. 1073, 117 L. Ed. 2d 278 (1992); *St. Ledger v. Commonwealth of Kentucky*, No. 92-CA-2688-MR (Ky. App. May 20, 1994), *motion for discretionary review granted*, No. 94-SC-468-D (Ky. October 19, 1994). This approach conflicts with the more recent decisions of this Court applying to state taxes the test of internal consistency to determine whether discrimination against interstate commerce would necessarily result if the subject state's tax regime were adopted by all states. Unless this Court resolves this confusion about the present validity of the *Darnell* holding in this context and the compensating tax defense, the practical effect is likely to be that other state courts will follow the pattern of these three decisions, thus ignoring this Court's modern Commerce Clause decisions flowing from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, *reh'g denied*, 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977).

B. The *Darnell* Decision Considered Multiple Taxation Only Obliquely

This Court has held that a violation of the Commerce Clause can be discerned by application of the

internal consistency test to determine whether the state tax scheme necessarily results in multiple taxation of interstate commerce by states. *See Goldberg v. Sweet*, 488 U.S. 252, 261, 109 S. Ct. 582, 589, 102 L. Ed. 2d 540 (1984). The North Carolina Supreme Court relied *solely* on *Darnell* in reversing the North Carolina Court of Appeals, stating that it was "loath to conclude that a Supreme Court decision [*Darnell*] has been implicitly overruled, ..." *Darnell* did not directly deal with multiple taxation.

The *Darnell* decision alluded in the following single sentence to the concern that Mr. Darnell's Tennessee corporation might also pay property tax in Tennessee, thus resulting in greater aggregate property tax on the Tennessee corporation and its Indiana shareholder than on an Indiana corporation and its Indiana shareholder:

> The case is pretty well disposed of by *Kidd v. Alabama*, 188 U.S. 730, 23 Sup. Ct. Rep. 401, 47 L. Ed. 669, [1903], where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered.

226 U.S. at 398.

However, *Kidd v. Alabama* did not discuss the Commerce Clause. It dealt only with a Fourteenth Amendment argument and stated:

> We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far.

188 U.S. at 732.

Thus, the *Kidd* decision was inapposite to *Darnell*, a Commerce Clause case.

C. The Supreme Court of North Carolina Treated the Compensating Tax Defense as Preempting the Internal Consistency Test, In Conflict with Applicable Decisions of this Court

The Supreme Court of North Carolina relied on *Darnell* to ignore the method of analysis established by this Court for a facially discriminatory tax for which a compensatory tax defense is proposed: *first*, is the tax facially discriminatory; if so, *second*, does the compensatory tax result in equality of in-state taxation; and *third*, even if so, does the combination of the two state taxes nevertheless violate the internal consistency test? *See Armco, Inc. v. Hardesty,* 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

Reliance on *Darnell* for ignoring the internal consistency test was improper. The *Kidd* decision simply stands for the well known principle that the Due Process Clause does not forbid multiple taxation by states. *See Curry v. McCanless*, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939). Viewed in the light most favorable to the Secretary of Revenue, the single sentence quoted above from the *Darnell* decision extended this view to apply also to the Commerce Clause in 1912 in a case involving alleged multiple state taxation of the same property. In 1991 this Court affirmed by an equally divided vote a decision of the District Court of Appeal of Florida that the Commerce Clause did not preclude Florida from taxing property that also was taxed by another state. *Ford Motor Credit Company, Inc. v. Department of Revenue*, 537 So. 2d 1011 (Fla. Dist. Ct. App.), *aff'd*, 500 U.S. 172, 111 S. Ct. 2049, 114 L. Ed. 2d 232 (1991) (equally divided Court). Whatever that affirmance might imply, the instant case does not raise the difficult issues surrounding taxation of the same property by two states, each of which has a reasonable ground for taxing it. See *Etting v. President, Directors & Co. of Bank*, 11 Wheat. 59 (1826) (holding that affirmance by equally divided U.S. Supreme Court does not settle principles involved).

Rather, this case raises the issue whether a facially discriminatory property tax can be made nondiscriminatory in effect by imposing an income tax on another group of taxpayers, when the nationwide adoption of that taxing regime would inevitably result in heavier taxation in the aggregate of interstate commerce than intrastate commerce.

Example: Corporation X does business only in State A and so will pay tax there on 100% of its

income; if all its shareholders reside in State A, they will pay no intangibles tax. However, if Corporation X does half of its business in State B, it will still pay income tax on about 100% of its income (about half of its income will be taxed by each of State A and B); its shareholders in State A will pay intangibles tax on half of the value of their stock. By entering into interstate commerce, Corporation X causes an increase in the aggregate taxation of itself and its shareholders. If State A either taxed all of the value of stock owned by its residents, or imposed no tax on stock, no discrimination would exist.

This Court has ruled that the Commerce Clause requires a fair apportionment of the tax burden, and so forbids multiple taxation of income from interstate commerce by states. See *Allied-Signal, Inc. v. Director*, 112 S. Ct. 2251, 2258, 119 L. Ed. 2d 533 (1992). To ferret out multiple taxation this Court has applied the internal consistency test, which is failed by a state tax that, if adopted by all states, would necessarily result in multiple taxation of interstate commerce. The application of the internal consistency test is not limited to corporate income taxes. See *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 284-286, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987) (ruling that facially nondiscriminatory Pennsylvania flat taxes on trucks failed the internal consistency test); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (involving a facially discriminating gross receipts tax and making clear that the *risk* of multiple taxation under the internal consistency test on out-of-state businesses constitutes a discrimination that violates the Commerce Clause); *Goldberg v. Sweet*, 488 U.S. 252, 261, 109 S. Ct.

582, 589, 102 L. Ed. 2d 607 (1989) (involving a telecommunications tax and stating that the state tax must not cause multiple taxation under the internal consistency analysis); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984) (involving a facially discriminatory manufacturing tax and a wholesaling tax); *Container Corp. of America v. Franchise Tax Bd*, 463 U.S. 159, 169, 103 S. Ct. 2933, 2942-2943, 97 L. Ed. 2d 545 (1983) (involving franchise tax based on income).

The only distinctive feature of the application of the internal consistency test here is the aggregation of taxation of related taxpayers. This Court has never applied the internal consistency test in a case involving such aggregation (although *Darnell* obliquely raised the issue). This Court should determine and make clear whether *Darnell v. Indiana* specifically, and the compensating tax defense generally, can be relied upon in Commerce Clause cases to restrict the scope of a court's analysis of a combination of corporate income and shareholder property taxes to only those taxes imposed by the one state.

II. The Decision of the Supreme Court of North Carolina Conflicts in Principle With a Decision of a United States Court of Appeals and With Views Stated by this Court

The unresolved issue raised here is essentially the same as the question whether a single state's facially discriminatory use tax on goods purchased from out of state, in combination with its exactly equivalent and compensating sales tax on goods purchased in the state, nevertheless discriminates against interstate commerce by failing to allow a credit against the state's use tax for sales

tax paid to another state on the same property by the same taxpayer. Both cases require attention to the potential taxation by other states. This Court recently has declined to issue its writ of certiorari to the Second Circuit in a case where the Second Circuit ruled that the absence of such a credit did result in discrimination against interstate commerce due to a violation of the internal consistency test. *Barringer v. Griffes*, 1 F.3d 1331 (CA2 1993), *cert. denied*, 114 S. Ct. 879 (1994). The Second Circuit decision cited substantial authority from this Court indicating that absence of such a credit is fatal under the Commerce Clause, although commentators state that this Court has not ruled that a credit is required.[3]

III. The Supreme Court of North Carolina Has Decided a Federal Question in a Way that Conflicts With Applicable Decisions of this Court, by Misapplying *Darnell* and the Compensating Tax Defense

A. Summary

The opinion of the North Carolina Supreme Court conflicts with applicable decisions of this Court in that (1) it extends the holding of *Darnell* to facts that this Court does not intend to be controlled by *Darnell*, and (2) it ignores the more recent opinions of this Court defining the scope of the compensating tax defense.

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[3]Hellerstein & Hellerstein, *State Taxation II, Sales and Use, Personal Income, and Death and Gift Taxes*, ¶ 18.08[2] (1992). *But see Tyler Pipe Industries, Inc. v. Washington State Dept. of Rev.*, 483 U.S. 232, 245-247, 107 S. Ct. 2810, 2818-2819, 97 L. Ed. 2d 199 (1987) (indicating that a credit is required).

B. Misuse of the *Darnell* Decision Undercuts This Court's Authority to Interpret the Constitution

Darnell accepted the defendant state's compensating tax defense (without using that term) to a Commerce Clause challenge to a facially discriminatory state tax, on facts that differ radically from those at issue here. *Darnell* involved a state property tax on domestic corporations that was found to compensate for a facially discriminatory reduction of a state property tax on stock of domestic corporations. The North Carolina Supreme Court attempted to stretch this method of tax equalization to cover a state income tax on corporations doing business in the state, in combination with a state administered tax on corporate stock. The *Darnell* court thought it was sanctioning the taxation of the property of corporations once by Indiana. No such interrelationship exists in North Carolina because the corporate income tax is not a property tax and does not reflect in any direct way the amount and value of property of the corporation in the state or the value of the corporate stock.

C. The Supreme Court of North Carolina's Decision Not Only Conflicts with but Ignores Compensating Tax Decisions of this Court

Subsequent to the 1912 *Darnell*[4] decision this Court identified as such the compensating tax defense to objections to a state tax that facially discriminates against interstate commerce. This defense was not and cannot be proved in this case, even if one restricts the analysis to the taxes imposed by North Carolina alone, because there is no comparability between taxing stock as property and taxing corporate income, at unrelated rates.

A state tax that facially discriminates against interstate commerce is presumptively invalid under the Commerce Clause. See *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815, 1820 (1994). That facial discrimination can be removed in effect by proof of a valid "compensatory tax" designed to make interstate commerce bear the burden borne by intrastate commerce, but the compensating tax must be imposed by the state on "substantially equivalent events." 114 S. Ct. at 1821. A shareholder's owning stock and a corporation's receipt of income are *not* "substantially equivalent events." *Cf. Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, *reh'g denied*, 469 U.S. 912, 83 L. Ed. 2d 222 (1984) (holding that manufacturing and wholesaling are not substantially equivalent events); *Oregon Waste Systems, Inc.*

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[4]This Court's concern with more than generalized equilibration was reflected in *Darnell* itself, when the Court described but did not reach "the most serious aspect" of the plaintiff's Commerce Clause objections: the shareholder of a foreign corporation that owned tangible property in Indiana was not allowed any reduction for the value of the corporate property taxed by Indiana. 226 U.S. at 398. The *Darnell* opinion strongly implied that the lack of such a one-to-one offset of value taxed would destroy "substantial equality." However, the opinion did not reach that issue because the plaintiff did not own stock in such a foreign corporation.

v. Department, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994) (ruling that taxes on earning income and utilizing Oregon landfills are entirely different and non-comparable kinds of taxes).

The Supreme Court of North Carolina failed to apply the decisions of this Court specifying how clearly the compensating tax defense must be proved by the state in order to overcome a facial discrimination. This Court recently has stated that the only successful use of the compensatory tax defense in recent memory is the case of the sales and use taxes where the two taxes must involve the same rate of tax applied to equivalent bases. *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1353. States impose use taxes on the cost price of goods purchased from out-of-state vendors. The use tax does not discriminate against interstate commerce when the state also charges an exactly equal sales tax on the purchase prices of goods bought in the state. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1937).

This Court most recently rejected the compensating tax defense in *Associated Indus. of Missouri v. Lohman*, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994). Missouri sales taxes were equal to the Missouri use tax on similar purchases in 93% of the cases, and equalization of the sales and use taxes would have reduced the aggregate sales tax burden on in-state sales rather than on sales in interstate commerce. Nevertheless, due to the slightly heavier use taxation of out-of-state purchases in a minority of cases (i.e., lack of complete and easily verifiable parity of treatment) this Court rejected the compensating tax defense and ruled the Missouri tax regime to be unconstitutional. In doing so the opinion of Justice Thomas implied that "close enough for government work" is not

close enough to prove the compensating tax defense. 114 S. Ct. at 1820.

Footnote 5 of the *Lohman* opinion also warned against a court being drawn into "an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system." The North Carolina Supreme Court's decision entered into that very morass. It strained (and failed) to show nondiscrimination against interstate commerce by analyzing the state's corporate income tax and intangible property tax and by discussing price-earnings ratios and creating arguments that had not even been made by the Secretary of Revenue. It could not follow the course directed by that footnote of applying an applicable rate to substantially equivalent events because there is no common rate and there are no substantially equivalent events.

This Court should not allow state courts to roam the landscape searching for the vaguest notions of equality to justify taxes that facially discriminate against interstate commerce. Such state court opinions strip the Commerce Clause of its goal as stated in *Complete Auto Transit* to obtain a fair apportionment of taxes to each state.

The discrimination practiced by the North Carolina Secretary of Revenue rewards with lower intangible property taxation the shareholders of corporations that limit their business activities to North Carolina. This discrimination has the potential to affect the market in stocks traded in interstate commerce and to affect the

business decisions of corporations as to whether to operate outside their states of commercial domicile.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 13, 1995

[5]The North Carolina Supreme Court's opinion erroneously states that commerce in corporate stocks is entitled to a lesser level of Commerce Clause protection. *Cf. Boston Stock Exchange v. State Tax Com'n*, 429 U.S. 319, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977).

[6]Fulton Corporation has no parent or subsidiary companies.

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 305A93 - Wake

FULTON CORPORATION

v.

BETSY Y. JUSTUS
SECRETARY OF STATE

[Filed December 9, 1994]

Appeal by plaintiff and defendant as of right pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision by the Court of Appeals, 110 N.C. App. 493, 430 S.E.2d 494 (1993), reversing summary judgment for defendant, entered by Brooks, J., on 8 November 1991 in Superior Court, Wake County. This Court also allowed plaintiff's petition for discretionary review of additional issues pursuant to N.C.G.S. § 7A-31.[1] Heard in the Supreme Court 2 February 1994.

[1]Because of our resolution of the Commerce Clause issue against plaintiff's position, the additional issues raised in plaintiff's petition need not be addressed.

Womble Carlyle Sandridge & Rice, by Jasper L. Cummings, Jr., for plaintiff-appellant and -appellee.

Michael F. Easley, Attorney General, by *Marilyn R. Mudge*, Assistant Attorney General, for defendant-appellant and -appellee.

EXUM, Chief Justice

Plaintiff, Fulton Corporation, is a North Carolina corporation with its principle place of business in North Carolina. Plaintiff owns stock in other corporations and pays an "intangibles" tax on that stock to this State pursuant to N.C.G.S. § 105-203. On 1 May 1991 plaintiff filed suit challenging the constitutionality of North Carolina's intangibles tax levied on the ownership of corporate stock. Plaintiff alleged that the provisions of North Carolina's general statutes controlling the taxation of stock, particularly N.C.G.S. § 105-203, violate the Commerce Clause of the United States Constitution because the statute taxes more heavily stock of corporations not doing business in North Carolina. Plaintiff also alleged that the taxing scheme violates plaintiff's due process and equal protection rights under the North Carolina and United States Constitutions. Plaintiff requested that N.C.G.S. § 105-203 be declared null and void and that defendant be ordered to pay plaintiff a refund for the intangibles taxes paid by plaintiff for the 1990 tax year. Plaintiff and defendant both filed motions for summary judgment. The Superior Court allowed defendant's motion and denied plaintiff's motion on 15 November 1991.

Plaintiff appealed to the Court of Appeals. The Court of Appeals reversed the superior court's ruling,

holding the intangibles tax at issue violative of the Commerce Clause. The Court of Appeals, however, found that the unconstitutional provisions of the taxing scheme are severable and struck the portion of N.C.G.S. § 105-203 which reduces intangibles taxes based on the extent of business done in North Carolina by the issuing corporation. Thus, the intangibles tax on plaintiff's stock remained and plaintiff was denied a refund. Plaintiff appealed the decision of the Court of Appeals, arguing that the Court of Appeals correctly determined that the taxing scheme was unconstitutional, but that it erred in excising the deduction in N.C.G.S. § 105-203 rather than making the deduction applicable to the stock of all corporations. Defendant also appealed from the Court of Appeals' decision, arguing that N.C.G.S. § 105-203 does not violate the Commerce Clause.

We begin with an overview of North Carolina's intangible tax on corporate stock and other related tax statutes.[2] Pursuant to N.C.G.S. §§ 105-130 to 105-130.41, North Carolina imposes an income tax of 7.75%[3] on the net income of corporations doing business in North Carolina. N.C.G.S. § 105-130.3 (1992). If a corporation does business in North Carolina and other states, then only that percentage of its business income which is apportionable to North Carolina is taxable here. N.C.G.S. § 105-130.4(b) (1992). A corporation's business income is apportioned on the basis of three factors: (1) the value of

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[2]Several sections in Chapter 105 were amended in the 1991 and 1992 sessions of the General Assembly. None of the amendments affect the resolution of the issues presented in this case. All references are to the most recent version of the statutes.

[3]Prior to 1991 the tax rate was 7%.

the corporation's property owned, rented or used in North Carolina during the income year divided by the value of all the corporation's property owned, rented or used during the income year; (2) the total amount paid by the corporation in North Carolina during the income year as payroll divided by the total amount paid by the corporation everywhere during the income year; and (3) the corporation's total sales in North Carolina divided by the corporation's total sales everywhere during the income year. N.C.G.S. §105-130.4(j)(1), (k)(1), (l)(1) (1992). The first factor, sales, is double-weighted in the apportionment formula. N.C.G.S. § 105-130.4(i) (1992). A multi-state corporation's nonbusiness income, such as rents, royalties, and dividends are taxed depending on whether and to what extent the income has some connection to the state. N.C.G.S. § 105-130.4(c) (1992). For example, if the property from which rents and royalties are gained, is located in North Carolina, then that non-business income is taxable in North Carolina. N.C.G.S. § 105-130.4(d)(1) (1992).

A corporation, such as plaintiff here, whose commercial domicile is in North Carolina must pay income tax on dividends received on stock which it owns. N.C.G.S. 105-130.4(f) (1992). N.C.G.S. § 105-130.7(1) provides for a deduction in the dividends on which the corporation pays tax; it states:

> [T]he Secretary of Revenue shall determine from the corporate income tax return filed during the year ending September 30 by each corporation required to file a return during that period the proportion of the entire net income or loss of the corporation allocable to this State under the provisions

> of G.S. 105-130(4), except as provided herein. . . . A corporation which is a stockholder in any such corporation shall be allowed to deduct the same proportion of the dividends received by it from such corporation during its income year ending on or after September 30.

The amount of deductible dividends is capped at $15,000. N.C.G.S. § 105-130.8(6). Thus, the amount of dividends a corporate shareholder may deduct is based on the percentage of the issuing corporation's net income that is allocable to and taxable in this state. The greater percentage of corporate income allocated to and taxed in this State, the more dividend income the shareholder is allowed to deduct.

N.C.G.S. § 105-203 sets forth the intangible property tax to be levied against North Carolina residents for stock owned. It states:

> All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal tc.
>
> (1) In the case of a taxpayer that is a corporation, the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-

130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7. . . .

Thus the intangibles tax on stock is computed in the following manner; the greater the percentage of the issuing corporation's total income which is allocated to and taxed in this state the more dividend income from that corporation a corporate shareholder is allowed to deduct and the less intangibles tax the shareholder pays. The amount by which the intangibles tax against the shareholder is reduced, therefore, is directly related to the amount of the issuing corporation's income which is allocated to and taxed in this state. If 70% of the issuing corporation's income is allocated to North Carolina, then 70% of the dividends on that corporation's stock are deductible by the corporate shareholder as income, the stock's value for intangibles tax purposes is reduced by 70%, and the intangibles tax thereby decreased by 70%.

We now turn to the issue before us, which is whether North Carolina's intangibles tax on stock violates the Commerce Clause.

The United States Constitution grants Congress the authority to "regulate Commerce . . . among the several states." U.S. Const. art. II, § 8, cl. 3. It is well established that "[t]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States." *Freeman v. Hewit*, 329 U.S. 249, 252, 91 L. Ed. 265, 271 (1946), *reh'g denied*, 329 U.S. 832, 91 L. Ed. 705 (1947). Pursuant to the Commerce Clause no state may "impose a tax which discriminates

against interstate commerce . . . by providing a direct commercial advantage to local businesses." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 427 (1959). It is the Court's "'duty to determine whether the statute under attack, whatever its name may be, will, in its practical operation work discrimination against interstate commerce.'" *Maryland v. Louisiana*, 451 U.S. 725, 756, 68 L. Ed. 2d 576, 601 (1981) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 85 L. Ed. 275, 277 (1940)).

Even a discriminatory tax, however, will be upheld where it is "designed simply to make interstate commerce bear a burden already born by intrastate commerce." *Associated Indus. of Missouri v. Lohman*, 511 U.S. ____, ____, 128 L. Ed. 2d 639, 647 (1994). "Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the . . . Commerce Clause." *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. ____, ____, 128 L. Ed. 2d 13, 23 (1994). "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U. S. at 759, 68 L. Ed. 2d at 603.

Plaintiff argues that the intangibles tax on stock is facially discriminatory against corporations doing business outside North Carolina. Plaintiff asserts that due to the greater taxation of stock of corporations doing business outside North Carolina, those corporations will have more difficulty raising capital through the sale of stock in North Carolina than will corporations doing business in North Carolina only. Plaintiff also asserts that the current tax

scheme encourages corporations to conduct business in North Carolina since that will reduce the intangibles tax liability to its North Carolina shareholders thereby enhancing the marketability of its shares in North Carolina.

Defendant argues that there is no evidence in the record showing that the tax scheme will actually affect interstate commerce. Defendant also argues that this case is controlled by *Darnell v. Indiana*, 226 U.S. 390, 57 L. Ed. 267 (1912), and that any discrimination in the tax scheme can be justified as a compensatory tax.

After carefully reviewing the Supreme Court's jurisprudence in this area of law, which the Court itself has characterized as a "quagmire," *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 280, 97 L. Ed. 2d 226, 241 (1987), we conclude that the tax in question is permissible based on the Court's holding in *Darnell*.

In *Darnell* the plaintiff, a resident of Indiana, owned stock in a Tennessee corporation which paid no property taxes in Indiana. Indiana taxed all shares in foreign corporations owned by inhabitants of the state, and "all shares in domestic corporations when the property of the corporations . . . is not taxable to the corporation itself. If the value of the stock exceeds that of the tangible taxable property that excess also is taxed." *Darnell* at 397, 57 L. Ed. at 272. The plaintiff challenged the Indiana intangibles tax on the ground that it violated the Commerce Clause and the Fourteenth Amendment. The Court upheld the tax in an opinion by Justice Holmes, who reasoned:

The only difference of treatment disclosed by the record that concerns the defendants, is that the State taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality not-withstanding the technical differences was decided in *Kidd v. Alabama*, 188 U.S. 730, 732, 47 L. Ed. 669, 672, 23 Sup. Ct. Rep. 401.[4]

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[4]In *Kidd v. Alabama*, 188 U.S. 730, 47 L. Ed. 669 (1903), an Alabama tax on the stock of foreign railroads was challenged because there was no corresponding tax on the stock of domestic railroads. The Court upheld the tax against a challenge that the tax violated the Fourteenth Amendment, stating:

> We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything and we are now assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchise of the corporation are untaxed on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net value of different stocks.

The Court reasoned similarly in *Klein v. Board of Tax Supervisors of Jefferson County, KY.*, 282 U.S. 19, 75 L. Ed. 140 (1930). In Klein the plaintiff raised a Fourteenth Amendment challenge to a Kentucky tax on stock which exempted stock in corporations which

We find our case controlled by *Darnell*. In *Darnell* the Supreme Court found substantial equality, sufficient to satisfy the Commerce Clause, in taxing the stock of foreign corporations not paying property taxes and taxing the property of domestic corporations.[5] In the instant case the state imposes an intangibles tax on the shares of stock of corporations the amount of which is directly and inversely proportional to the income of the issuing corporation which is taxed in North Carolina. The effect is to reduce the intangibles tax liability for stock held in a corporation to the extent the corporation's income is taxed

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had 75% of their total property in Kentucky and paid Kentucky property taxes on the property. The Court affirmed the tax, stating:

> If the corporation having all its property in the state had paid taxes upon the whole, usually it would be just not to tax the stockholder in respect of values derived from what has already borne its share.

Id. at 23, 75 L. Ed. at 142-43.

While *Kidd* and *Klein* involved challenges to taxes based upon the Fourteenth Amendment, which makes those cases distinguishable from the challenge before us based on the Commerce Clause, they are nevertheless persuasive authority for the proposition that a state may tax the shares of certain corporations, such as a corporation doing business outside North Carolina, and with respect to other corporations, such as corporations operating exclusively in the state, tax the corporation itself, whether it be a property tax or an income tax.

[5]The Indiana statute actually taxed all foreign corporations regardless of whether they actually paid property taxes in Indiana. The plaintiffs in *Darnell*, however, did not establish that their corporations paid Indiana property taxes and the Supreme Court limited its holding to situations where the corporation in question paid no property tax in Indiana.
Darnell, 226 U.S. at 398, 57 L. Ed. at 272.

in this state and to increase the intangibles tax liability on stock held in a corporation to the extent the corporation's income is not taxed in North Carolina. This is the very kind of "compensating" tax scheme the Supreme Court upheld in *Darnell*.

Plaintiff attempts to distinguish *Darnell* on the ground that "[u]nlike the instant case *Darnell* dealt with a property tax on the shareholder that was directly offset by the property tax on the corporation." We agree with plaintiff that the instant case does not involve an intangibles tax to the shareholder which is offset by a *property* tax to the corporation, but we find that difference immaterial. This case involves a reduction in the intangibles tax to the shareholder which is offset in a direct proportional way by an *income* tax to the corporation.

Where a corporation does business inside and outside North Carolina, it pays income tax to North Carolina on only that portion of its income allocable to North Carolina under N.C.G.S. § 105-130.4. A corporation doing business solely in North Carolina pays an income tax on all of its income. The North Carolina income tax paid by a corporation doing business solely in North Carolina will therefore be greater than the North Carolina income tax of similar corporation doing some business outside North Carolina. This excess income tax paid by the North Carolina corporation offsets, or balances, the intangible property tax on stock of the corporations doing some business outside North Carolina in the same manner that the property tax paid by domestic corporations in *Darnell* offset the intangible property tax on shares of stock of foreign corporations which did not pay property taxes in Indiana.

Plaintiff further attempts to distinguish *Darnell* on the ground that while there might be a relationship between the value of a corporation's stock and the value of its property, the "relationship between the stock-issuing corporation's North Carolina income tax and the shareholders' North Carolina intangible property tax" is "vague." We disagree.

Corporate income tax, which is directly proportional to corporate income, affects the amount of corporate income available for distribution as dividends to shareholders, and dividends paid are a major component of the valuation of the corporation's stock. Hence, we think it a sound generalization that corporate income, and income tax paid, are strongly related to the value of the corporation's stock. The strength of this relationship is aptly demonstrated by the fact that economists and investors frequently make use of the "price-earnings" ratio, or P/E ratio, which essentially represents the relationship of the value of a corporation's stock to its earnings. *See, e.g.,* 3 The New Palgrave Dictionary of Money & Finance 176 (1992).[6]

Plaintiff also asserts that even if a corporation's income bears a relationship to the value of its stock, taxation of corporate income and taxation of corporate shares do not necessarily result in equal treatment. Plaintiff provides the following hypothetical situation:

[6]The P/E ratio usually refers to price per share, but that ratio is the same as the value of all corporate stock, which is price per share times number of shares outstanding, to the corporations' earnings, which is earnings per share times number of shares outstanding.

> Corp. X, operating solely in North Carolina, earns $100 income from unproductive real estate worth $1 million. It pays about $7 North Carolina income tax and its shareholders pay zero intangible tax. Corp. Y, an identical corporation operating solely in Virginia, pays no North Carolina income tax and its shareholders pay $2,500 intangible tax on $1 million in stock value.

We agree that in this hypothetical situation the intangibles tax on shares of a foreign corporation greatly exceeds the income tax to a similar corporation operating solely in North Carolina. Only in exceptional and extreme cases, such as the one suggested by plaintiff, would North Carolina's tax against shares of corporations doing business in other states exceed the tax against the income of similar corporations doing business in North Carolina.

North Carolina taxes corporate income at 7.75 percent and taxes ownership of stock at .25 percent of the taxable value of the stock. Given these tax rates, a North Carolina corporation need only have a P/E ratio less than 31 (7.75/.25) in order to have the tax against its income exceed the intangibles tax against the stockholders of a comparable corporation doing business only in Virginia and having all its shareholders in North Carolina.[7] Since

[7]With the P/E ratio of 31, stock valued at $3100 earns $100 of income to the corporation. If the corporation conducted no business in North Carolina, the intangibles tax against the shareholders would be .0025 x $3100, or $7.75; if the corporation conducted all of its business in North Carolina, then the income tax against the corporation would be .0775 x $100, or $7.75.

P//E ratios are only rarely greater than 31,[8] most out-of-state corporations will in fact be paying less taxes to North Carolina, directly in the form of an income tax and indirectly in the form of an intangibles tax against shares, than a similar North Carolina corporation. The result reached in plaintiff's hypothetical situation above seems to unfairly tax out-of-state corporations, but that hypothetical involves the unrealistic situation of a corporation with P/E ratio of 10,000. The absurdity of plaintiff's hypothetical demonstrates that under ordinary circumstances there will be no greater taxation of out-of-state corporations and their shareholders than there will be in-state corporations and their shareholders.

While there are some differences between the tax and issue here and the one in *Darnell*, we find these differences not material and we believe that North Carolina's intangibles tax on corporate stock, when considered with its corporate income tax, provides for "substantial equality" as was found in *Darnell*.

We also feel it necessary briefly to address the continued validity of *Darnell*. While plaintiff's principle argument regarding *Darnell* is that it is distinguishable, which we have rejected, it also argues to a lesser degree that *Darnell* has been implicitly overruled or modified by more recent cases. The principal modern cases discussing the compensating tax and cited by plaintiff are *Armco v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, *reh'g denied*, 467

[8] *See, e.g.*, 3 The New Palgrave Dictionary of Money & Finance at 177 (showing Standard & Poor's Composite Index for P/E ratio from 1926 to 1991; P/E ratio mainly between 10 and 20, never greater than 25).

U.S. 638, 81 L. Ed. 2d 540 (1984) and *Maryland v. Louisiana*, 451 U.S. 725, 68 L. Ed. 2d 576 (1981).

In *Armco* West Virginia imposed a gross receipts tax on wholesale sales of tangible property; local manufacturers, however, were exempt from this tax. 467 U.S. at 640, 81 L. Ed. 2d at 5-6. The plaintiff, an Ohio corporation selling steel products wholesale in West Virginia, challenged the wholesale tax. *Id.* The Court first determined that the tax was facially discriminatory against interstate commerce and then proceeded to examine whether the tax could be saved as a compensating tax. 467 U.S. at 642, 81 L. Ed. 2d at 545. West Virginia argued that the wholesale tax exempting local manufacturers was designed to offset a sales tax imposed against local manufacturers only. The Court rejected that argument, reasoning that manufacturing and wholesaling are not "substantially equivalent events" and that certain aspects of the West Virginia sales tax on manufacturers indicated that the tax was aimed at manufacturing and not wholesaling.[9] *Id.* at 643, 81 L. Ed. 2d at 545-46.

In *Maryland v. Louisiana* the Court faced a Louisiana tax on the "first use" of gas; the tax, however, did not apply to gas extracted from Louisiana, which was subject to a "severance tax" equal to the first use tax, and did not apply to gas sold in Louisiana for certain purposes. 451 U.S. at 731, 68 L. Ed. 2d at 586. The Court first determined that the tax "discriminate[d] against interstate

[9] The aspects of the West Virginia taxing scheme the Court looked to were that West Virginia did not reduce the manufacturing tax when the goods were sold outside West Virginia and that the manufacturing tax was decreased when part of the manufacturing occurred outside the state. *Armco*, 467 U.S. at 643, 81 L. Ed. 2d 546.

commerce in favor of local interests." *Id.* at 756, 68 L. Ed. 2d at 602. The Court then dealt with Louisiana's argument that the first use tax was equalized by the severance tax which affected only local producers of gas. The Court rejected the argument, finding that the rationale behind the severance tax, which is a tax on the privilege of severing resources from the soil, does not exist with respect to gas not extracted from Louisiana. *Id.* at 759, 68 L. Ed. 2d at 603.

After reviewing these cases, we believe we should not conclude that *Darnell* has been implicitly overruled. First, we generally are loath to conclude that a Supreme Court decision has been implicitly overruled, especially when the Court has emphasized that issues involved here must be decided on a case-by-case basis. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329, 50 L. Ed. 2d 514, 524 (1977) (whether law violates Commerce Clause "turns on the unique characteristics of the statute at issue and the particular circumstances in each case"). The Supreme Court of Indiana unanimously reached the same conclusion in *Indiana Department of State Revenue v. Felix*, 571, N.E.2d 287, 292 (1991), *cert. dismissed*, ____ U.S. ____, 117 L. Ed. 2d 278 (1992) (after thorough analysis, court could not "conclude that *Darnell* has been implicitly overruled by the United States Supreme Court").

We are also reluctant to conclude that *Darnell* has been overruled by *Armco* and *Maryland v. Louisiana* because the taxes at issue in those cases are readily distinguishable. *Armco* and *Maryland v. Louisiana* dealt with taxes on the interstate exchange of goods, namely steel products and gas; this case, however, concerns a tax which allegedly discriminates against the interstate ownership of corporate shares. Since a corporation's

continued existence and success depend most heavily on its ability to market its goods, a discriminatory tax levied upon a corporation's trade may well come under closer Commerce Clause scrutiny than a tax on the stock it issues. The latter has no effect on the corporation's trade and, we think a negligible effect on a multi-state corporation's ability to raise capital.

Thus, as this case is controlled by *Darnell*, which has not been overruled, we rule in favor of defendant and conclude that the tax is valid. Finding the tax valid, we do not reach plaintiff's questions regarding a refund and attorney's fees.

Plaintiff also argues in its brief that the tax is unconstitutional under other provisions of the state and federal constitutions. No reference was made to bringing this argument before the Supreme Court in plaintiff's notice of appeal, petition for discretionary review or response to defendant's notice of appeal. Plaintiff has not discussed those arguments in its new brief filed with us. Therefore, we conclude that this issue is not properly before this Court. N.C.R. App. P. 16(a) & 28(a).

The decision of the Court of Appeals is, therefore, reversed and the judgment of the Superior Court reinstated.

REVERSED AND REMANDED.

APPENDIX B

IN THE COURT OF APPEALS

FULTON CORP. v. JUSTUS

[110 N.C. App. 493 (1993)]

FULTON CORPORATION, PLAINTIFF
v.
BETSY Y. JUSTUS, SECRETARY OF REVENUE, DEFENDANT

No. 9210SC15

(Filed 15 June 1993)

Appeal by plaintiff from judgment entered 8 November 1991 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 8 December 1992.

Womble Carlyle Sandridge & Rice, by Jasper L. Cummings, Jr., for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for defendant appellee.

COZORT, Judge.

Plaintiff filed suit challenging the constitutionality of North Carolina's intangibles tax levied on ownership of corporate stock. Plaintiff contends the provisions violates the Commerce Clause of the United States Constitution by increasing the tax liability for shares of stock of corporations which have business activities, property locations, and tax liabilities outside of North Carolina; and by lessening the tax liability for shares in corporations whose business and property are largely or completely in North Carolina. The superior court granted summary judgment for the defendant Secretary of Revenue. We find the taxing scheme violates the Commerce Clause, and we reverse. We further find that the provisions of the taxing scheme are severable, and we strike the portion of N.C. Gen. Stat. § 105-203 which gives a reduction in intangibles tax liability under the taxable percentage provision.

We begin with an overview of North Carolina's intangibles tax on corporate stock and other related tax statutes. (Several sections in Chapter 105 were amended in the 1991 and 1992 sessions of the General Assembly. None of the amendments affect the resolution of the issues presented in this case. For convenience to the reader, all references are to the most recent version of the statutes.) Pursuant to N.C. Gen. Stat. §§ 105-130 through 105-130.41 (1992), North Carolina imposes an income tax on corporations doing business in North Carolina. If a corporation does business only in North Carolina, then one hundred percent of the corporation's business income is taxed in North Carolina. N.C. Gen. Stat. § 105-130.3 (1992). If a corporations does business in North Carolina and other states, then only that percentage of business income apportioned to North Carolina is taxable here. N.C. Gen. Stat. § 105-130.4(b) (1992). A corporation's

business income is apportioned on the basis of three factors: (1) the corporation's total sales in North Carolina divided by the corporation's total sales everywhere during the income year; (2) the value of the corporation's property owned, rented or used in North Carolina during the income year divided by the value of all the corporation's property owned, rented or used during the income year; and (3) the total amount paid by the corporation in North Carolina during the income year as compensation divided by the total amount paid by the corporation everywhere during the income year. N.C. Gen. Stat. § 105-130.4(i) through (1)(3). The first factor, sales, is double-weighted in the apportionment formula. *Id.* A multistate corporation's nonbusiness income, such as rents, royalties, interest, and gains and losses, is subject to North Carolina income tax if the income has some connection to the state; for example, North Carolina is the corporation's principal place of business or the situs of the non-business activities or investments. N.C. Gen. Stat. § 105-130.4(c)-(h) (1992).

Pursuant to N.C. Gen. Stat. § 105-217 (1992), North Carolina imposes an intangibles tax on accounts receivable; bonds, notes, and other evidences of debt; beneficial or equitable interests in foreign trusts; and shares of stock. N.C. Gen. Stat. § 105-203 (1992) provides in pertinent part:

> All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal to:

> (1) [T]he proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7. . . .

The provision beginning with "less the proportion of the value" is commonly referred to as the taxable percentage provision, which is the subject of plaintiff's challenge.

Under the tax scheme, if a corporation does no business in North Carolina and has no taxable income here, then the taxable percentage of a shareholder's stock is one hundred percent. If a multistate corporation does business in North Carolina and earns business and/or nonbusiness income subject to North Carolina income tax, then the taxable percent of a shareholder's stock is the inverse of the issuing corporation's net taxable income in North Carolina. The tax is collected by the state, made part of the General Fund, and is available for appropriation to the taxpayer's resident county. N.C. Gen. Stat. § 105-213.1 (1992).

Plaintiff is a North Carolina corporation which, as of 31 December 1990, held stock in six corporations. Of the six corporations, only Food Lion, a multistate corporation, conducted business in North Carolina. Since forty-six percent of Food Lion's net income was subject to North Carolina corporate income tax for the 1990 taxable period, the taxable percentage of plaintiff's stock in Food Lion was fifty-four percent. The taxable percentage of plaintiff's stock in the remaining five corporations was one hundred percent. On 8 January 1991, plaintiff filed an intangible personal property tax return and remitted

$10,884.00. On 1 May 1991, plaintiff filed suit in Wake County Superior Court seeking a refund of the $10,884.00 paid in intangible tax, a declaratory judgment that N.C. Gen. Stat. § 105-203 is unconstitutional, and attorneys' fees. Both parties moved for summary judgment. Judge Dexter Brooks granted summary judgment for the Secretary of Revenue.

On appeal, plaintiff argues that the trial court erred in granting summary judgment because the intangibles tax (1) violates the Commerce Clause of the United States Constitution, and (2) violates the Due Process and Equal Protection Clauses of the United States and North Carolina Constitutions. Plaintiff further argues that the trial court erred in denying relief pursuant to 42 U.S.C.S. § 1983 and attorneys' fees pursuant to 42 U.S.C.S. § 1988.

[1] We first consider whether plaintiff-taxpayer has standing to challenge the constitutionality of the statute. In North Carolina, a taxpayer has standing to challenge a tax if "'the tax levied upon him is for an unconstitutional . . . purpose, . . . the carrying out of all the challenged provisions "will cause him to sustain personally, a direct and irreparable injury," or [if] he is a member of the class prejudiced by the operation of the statute . . . .'" *Orange County v. N.C. Dept. of Transportation*, 46 N.C. App. 350, 361, 265 S.E.2d 890, 899, *disc. review denied*, 301 N.C. 94 (1980)(citations omitted). The United States Supreme Court has recognized, at lease implicitly, that a local taxpayer has standing to challenge a tax on the grounds that the tax violates the Commerce Clause. *See Goldberg v. Sweet*, 488 U.S. 252, 261, 102 L. Ed. 2d 607, 617 (1989); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 10 L. Ed. 2d 202, *reh'g denied*, 374 U.S. 858, 10 L. Ed. 2d 1082 (1963); *I.M. Darnell & Son Co. v. Memphis*, 208 U.S.

113, 52 L. Ed. 413 (1908); *Walling v. Michigan*, 116 U.S. 446, 29 L. Ed. 691 (1886). We thus find plaintiff has standing to challenge the taxing provisions.

[2] Next, we consider plaintiff's argument that North Carolina's intangibles tax violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3 confers upon Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Plaintiff argues: (1) that the discrimination appears on the face of the statute; (2) that the tax indirectly discriminates against out-of-state business; and (3) that the compensating tax defense is not available to save the tax. Plaintiff summarizes the discrimination as follows: The more a corporation's business and property are located in North Carolina, the higher is the percentage of its income subject to taxation in this state, and the higher is the percentage of its stock not subject to the intangibles tax. The more a corporation's business and property are located out-of state, the higher is the percentage of its stock subject to the intangibles tax. Therefore, the tax scheme favors corporations that operate totally or more in North Carolina and disfavors corporations that operate totally or more in other states. Plaintiff cites two possible impacts on interstate commerce. First, plaintiff allege the tax encourages investors to buy stock in local corporations, thereby possibly affecting the ability of out-of-state corporations to raise capital in North Carolina, thus lessening the trading of stocks in interstate commerce. Second, plaintiff alleges local corporations may be encouraged not to enter interstate commerce in order to avoid the intangibles taxation for their shareholders.

To survive constitutional challenge under the Commerce Clause, a tax must (1) apply to an activity with a substantial nexus with the taxing state, (2) be fairly apportioned, (3) be fairly related to the services provided by the state, and (4) not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331, *reh'g denied*, 430 U.S. 976, 52 L. Ed. 2d 371 (1977). At issue here is the fourth requirement. It is fundamental that "[n]o State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329, 50 L. Ed. 2d 514, 524 (1977)(quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 427 (1959)). "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce." *Id.* at 334-35, 50 L. Ed. 2d at 527. "Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that 'forecloses tax-neutral decisions and . . . creates . . . an advantage' for firms operating in [the State] by placing 'a discriminatory burden on commerce to its sister States.'" *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406, 80 L. Ed. 2d 388, 402 (1984)(quoting *Boston Stock Exchange*, 429 U.S. at 331, 50 L. Ed. 2d at 525).

Discrimination may appear on the face of the statute or in its practical operation. "When a tax, on its face, is designed to have discriminatory economic effects, the Court 'need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'" *Id.* at 406-07, 80 L. Ed. 2d at 403 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760, 68 L. Ed. 2d 576, 604 (1981)). "Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Management v. Hunt*, 504 U.S. ---, 119 L. Ed. 2d 121, 132 (1992). "[W]here discrimination is patent, . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. v. Limbach*, 486 U.S. 269, 276, 100 L. Ed. 2d 302, 310 (1988).

"[A] State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." *Id.* at 278, 100 L. Ed. 2d at 311. A state may also validate a facially discriminatory tax by showing that the tax is a compensatory tax. A tax may be considered a compensating tax when "[the] State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." *Maryland v. Louisiana*, 451 U.S. at 759, 68 L. Ed. 2d at 603; *see also Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 111 L. Ed. 2d 734 (1990).

Applying these principles to North Carolina's intangibles taxing scheme, we find that the tax facially discriminates against interstate commerce. Shareholders of out-of-state corporations are required to pay intangibles taxes on a higher percentage of shares than shareholders of corporations operating solely in North Carolina. We further find that the facially discriminatory tax indirectly encourages the development of local business by placing a greater burden on economic activities occurring outside North Carolina than is placed on similar activities within

North Carolina. The tax forecloses tax-neutral decisions and creates an advantage for firms operating in North Carolina. *See Westinghouse,* 466 U.S. at 406, 80 L. Ed. 2d at 402.

[3] We next consider whether the discriminatory effect of the tax is counterbalanced by a compensating tax. We must determine if the State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, *reh'g denied*, 469 U.S. 912, 83 L. Ed. 2d 222 (1984), the United States Supreme Court addressed the constitutionality of West Virginia's business and operation tax. There, plaintiff, an Ohio corporation engaged in the business of manufacturing and selling steel products in West Virginia, challenged on Commerce Clause grounds the constitutionality of West Virginia's tax requiring persons engaged in the business of selling tangible property at wholesale to pay taxes on gross receipts. Local manufacturers were exempt from the gross receipts tax; however, they were required to pay a higher manufacturing tax. The United States Supreme Court found the tax unconstitutional, rejecting West Virginia's argument that the higher manufacturing tax was a compensating tax for the gross receipt tax. The Court held:

> [M]anufacturing and wholesaling are not "substantially equivalent events" such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing and with portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of State, and that it is reduced when part of the manufacturing takes place out of State, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax imposed on Armco and other sellers from other States.

Id. at 643, 81 L. Ed. 2d at 545-46. The Court further reasoned that there was discrimination against interstate commerce when the two taxes were considered together: "If Ohio or any of the other 48 States imposes a like tax on its manufacturers -- which they have every right to do -- then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* at 644, 81 L. Ed. 2d at 546. Finally, the Court rejected West Virginia's argument that Armco had to prove actual discriminatory impact by naming a state that imposes a manufacturing tax resulting in a tax burden higher than that imposed on Armco's competitors in West Virginia. Rather, the test is whether the facially discriminatory tax is internally consistent such that "'if applied by every jurisdiction' there would be no impermissible interference with free trade." *Id.*

The Secretary of Revenue argues here that taxing shareholders on the proportion of their stock values equivalent to the percentage of the issuing corporation's income taxed outside the state compensates for the state's inability to tax the corporation's out-of-state property and the income it generates. We disagree. We find the Court's reasoning in *Armco* applicable to this case. We

note first that there is only a vague relationship between property taxes paid by a corporation to governmental entities in North Carolina and intangibles property tax paid by its shareholders on the corporation stock. As plaintiff points out, under the tax scheme a corporation could pay no property taxes in North Carolina, and the taxable percentage of its stock still be less than one hundred percent because the taxable percentage is computed by multiplying *three* factors: sales, payroll, and property. Second, the "compensating tax" is levied upon the shareholder, a taxpayer different from the corporation. If a corporation owns no property in North Carolina, the state has no burden of providing protection to the corporation's property and should not be allowed to tax the corporation's stock as proxy for the corporate property. We find no substantially equivalent event justifying the imposition of the intangibles tax at a higher percentage on the stock of out-of-state corporations than in-state corporations. We thus reject the Secretary's argument on compensating tax.

The Secretary further argues that *Darnell v. State*, 174 Ind. 143, 90 N.E. 769 (1910), *aff'd, Darnell v. Indiana*, 226 U.S. 390, 57 L. Ed. 267 (1912), is dispositive of plaintiff's appeal. In *Darnell*, Indiana sought to collect taxes on stock of a Tennessee corporation owned by an Indiana resident. Under the Indiana statute, the state could levy taxes on all shares in a foreign corporation, except national banks, owned by state residents, and all shares in a domestic corporation owned by state residents when the property of the corporations was not exempt or not taxable to the corporation itself. *Id.* at 397-98, 57 L. Ed. at 272. The value of the stock exceeding the value of the tangible taxable property was also taxable. Plaintiff argued to the Indiana Supreme Court that the tax

discriminated "in favor of domestic stocks as against shares in a foreign corporation, and that a resident owning stock in a domestic corporation escapes taxation thereon, while his next-door neighbor owning shares of stock in a foreign corporation is required to pay taxes on his holdings." *Darnell v. State*, 174 Ind. at 153-54, 90 N.E. at 773. The Indiana Supreme Court upheld the tax, finding that the purpose of the tax was "to require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation." *Id.* at 156, 90 N.E. at 774. The Indiana Supreme Court stated:

> Domestic corporations are taxed upon all their property: . . . The state, in its discretion, might tax the shares of stock in such corporation to the individual owners thereof residing in this state, but it would in a sense be double taxation, and it has not been the policy of this state to do so. Shares of stock in a foreign corporation doing business in another state owned and held by a resident of this state are taxed because they have not been and cannot be otherwise taxed by this state. If a corporation organized in this state is engaged in business in another state, and all its tangible property is outside this state, then its shares of stock owned by residents within this state are taxable in the same manner as stock in a foreign corporation. The fact that the state in which the corporate property may be situated taxes such tangible property in no wise affects the right of this state to tax its own inhabitants upon all their personal property including shares of stock in such foreign corporation. The man who resides in one state and enjoys the benefit of its schools, churches, society, highways, and other public

accommodations, as well as its governmental protection over his person and property, is in no position to complain when required to contribute by taxation ratably upon his property for the maintenance of these institutions and the local government. It is clear to our minds that the tax law of Indiana is not open to the charge of discrimination against stock in foreign corporations, but imposes only just and equal burdens upon all corporate stocks without regard to the place of incorporating or of conducting the corporate business, and does not violate either the third clause of section 8, art. 1, or the fourteenth amendment to the Constitution of the United States, and is accordingly valid.

Id. at 156-57, 90 N.E. at 774 (citations omitted). The United States Supreme Court affirmed with Justice Holmes writing:

> The case is pretty nearly disposed of by Kidd v. Alabama, 188 U.S. 730, 47 L. Ed. 669, 23 Sup. Ct. Rep. 401, where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered. But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other states, contrary to principles often recognized. The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the state. But, as to this, it is enough to say that, however the statues may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and

> that, as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground . . . .
>
> The only different on treatment disclosed by the record that concerns the defendants is that the state taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in Kidd v. Alabama, 188 U.S. 730, 732, 47 L. Ed. 669, 672, 23 Sup. Ct. Rep. 401.

Darnell v. Indiana, 226 U.S. at 397-98, 57 L. Ed. at 272 (citations omitted).

We find *Darnell* distinguishable. Under the 1912 Indiana tax scheme, to the extent that a corporation paid property taxes to Indiana, the corporation's shareholders were exempt from paying taxes on the identical value of property already taxed to the corporation. As noted by the Indiana Supreme Court, the purpose of the tax was to "require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation." *Darnell*, 174 Ind. at 156, 90 N.E. at 774. Under the North Carolina scheme, corporate stock is not viewed as embodying the very same real and personal property owned by the corporation. Unlike the Indiana scheme, there is no effort to tax corporate property only once, to the extent its value is represented in the stock value. There is no one-to-one correlation between *property* tax paid by the corporation and taxes paid by the shareholder on shares owned. There is, however, a correlation between *income* taxed to the corporation and the property

(shares) of the shareholder. In determining the amount of business income to be taxed to the corporation, the amount of corporate property located in North Carolina is only one of three unequally weighted factors: sales, payroll, and property. *See* N.C. Gen. Stat. § 105-130.4(i) through (1)(3). Since the sales factor is double weighted, the property factor accounts for only one-fourth of the apportionment formula. *See* N.C. Gen. Stat. § 105-130.4(i). We note further that North Carolina has largely abandoned its efforts to avoid double taxation of corporate income. For example, under the scheme for taxing dividends, corporate income in the form of dividends is subject to double taxation. *See* N.C. Gen. Stat. §§ 105-130.7(1) and 105-151.19 (1992). We conclude that the difference in the 1912 Indiana tax scheme and the present North Carolina tax scheme is significant, such that *Darnell* is not dispositive of plaintiff's appeal.

[4] Having found the intangibles taxing scheme to be unconstitutional, we now must determine the proper remedy. Plaintiff argues that the entire tax must be stricken. The Secretary argues that we must enforce the Intangibles Tax Article's severability clause, thus excising the phrasing which reduces the intangibles tax on corporate stock of totally or partially North Carolina corporations. We find the Secretary's argument persuasive. N.C. Gen. Stat. § 105-215 (1992) provides:

> If any clause, sentence, paragraph, or part of this [Intangible Personal Property Tax] Article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Accordingly, we find that we must excise from N.C. Gen. Stat. § 105-203 this language:

> [L]ess the proportion of the value that is equal to:
>
> (1) In the case of a taxpayer that is a corporation, the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . .

As rewritten, the statute levies an intangibles tax upon "[a]ll shares of stock . . . owned by residents of this State . . . ."

Plaintiff, a resident owner of stock, is subject to the tax and not entitled to a refund. Both the United States Supreme Court and North Carolina Supreme Court have "recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a case the rule is not applied retroactively." *Swanson v. State of N.C.*, 329 N.C. 576, 581, 407 S.E.2d 791, 793 (1991). Accordingly, we find retroactive application of the revised statute inequitable and therefore order the revised statute to apply prospectively to the 1994 tax year.

We further find that plaintiff is not entitled to relief under 42 U.S.C.S. § 1983. A party may bring suit against state officials pursuant to 42 U.S.C.S. § 1983 for violations of the Commerce Clause. *Dennis v. Higgins*, 498 U.S. 439, 112 L. Ed. 2d 969 (1991). "[W]hen an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacities are 'persons' under section 1983 when the remedy sought is monetary damages." *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992). "'[A] state official in his . . . official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 771, 413 S.E.2d at 283 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 58 (1989)) (citations omitted). In its complaint, plaintiff seeks monetary damages and declaratory relief, not injunctive relief. Therefore, plaintiff is not entitled to relief pursuant to 42 U.S.C.S. § 1983 or 42 U.S.C.S. § 1988.

Having decided the issue on Commerce Clause grounds, we need not address plaintiff's Due Process and Equal Protection arguments.

In sum, we hold that the portion of the State's intangibles tax scheme which increases the tax liability for owners of stock in corporations whose business and property is not completely in North Carolina violates the Commerce Clause of the United States Constitution. That language is excised from N.C. Gen. Stat. § 105-203. Plaintiff is entitled to no refund. The trial court's judgment for the defendant is reversed, and the cause is

remanded for entry of a judgment declaring the intangibles tax provision at issue in violation of the Commerce Clause. Plaintiff is entitled to no further relief.

Reversed and remanded.

Judges GREENE and WYNN concur.

APPENDIX C

N.C.Gen. Stat. § 105-203 (1992) provides in relevant part:

All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal to:

(1) [T]he proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . .

N.C. Gen. Stat. § 105-130.7 provides in relevant part:

(1) . . . the proportion of the entire net income of the corporation allocable to this State under the provision of G.S. 105-130.4, except as provided herein. . . . .

N.C. Gen. Stat. § 105-130.4 provides in relevant part:

§ 105-130.4 Allocation and apportionment of income for corporations.

. . . .

(b) A corporation having income from business activity which is taxable both

within and without this State shall allocate and apportion its net income as provided in this section. . . . .

(c)-(h) [contain rules for allocating specific types of corporate income such as interest and dividends to North Carolina if the corporation's commercial domicile is in the state, or the income has other connections with the state] . . . .

(i) All business income of corporations . . . shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four. . . . .

(j)(1) The property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned or rented and used in this State during the income year and the denominator of which is the average value of all the corporation's real and tangible personal income owned or rented and used during the income year.

. . . .

(k)(1) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the income year by the corporation as compensation, and the denominator of which is the total compensation paid everywhere during the income year. . . . .

(l)(1) The sales factor is a fraction, the numerator of which is the total sales of

> the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. . . . .

N.C.Gen. Stat. § 105-130.3 provides in relevant part:

> A tax is imposed on the State net income of every C Corporation doing business in this State at seven and seventy-five one-hundredths percent (7.75%) of the corporation's State net income.